SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. 13475/2000

MELVYN KAUFMAN,

Plaintiff-Appellant,

- against -

NOTICE OF ENTRY

ANNE FASS, DAVID FASS, HOULIHAN LAWRENCE INC., BURBANK WHITTEMORE INC., & EDGEWATER POINT PROPERTY OWNER'S ASSOCIATION, INC.,

Defendants-Respondents.

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LEONARD N. SPANO
COUNTY CLERK
COUNTY OF
WESTCHESTER

PLEASE TAKE NOTICE, that annexed hereto as Exhibit "A" is the decision and order of the Honorable Kenneth W. Rudolph, a Justice of the Supreme Court of the State of New York, dated June 28, 2001 and entered in the office of the Clerk of the County of Westchester on July 2, 2001.

Dated: New York, New York
August 20, 2001

Respectfully,

KUCKER & BRUH, LLP
Attorneys for the Plaintiff-Appellant
The Bar Building
36 West 44th Street — Suite 415
New York, New York 10036
(212) 869-5030

By: /s/ John M. Churneftsky
John M. Churneftsky, Esq.

To: Bleakley Platt & Schmidt
Attorneys for Defendants-Respondents
1 North Lexington Avenue
White Plains, New York 10602
Attention: William H. Mulligan, Jr., Esq.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILE AND ENTERED
ON 7-2 2001
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH
Justice.

MELVYN KAUFMAN,

Plaintiff,

-against-

ANNE FASS, DAVID FASS, HOULIHAN LAWRENCE INC., BURBANK WHITTEMORE INC., & EDGEWATER POINT PROPERTY OWNER'S ASSOCIATION, INC.,

Defendants.

Index No. 13475/00
Motion Date: 2/23/01

DECISION

The following papers numbered 1 to 27 read on this motion and cross motion.

	PAPERS NUMBERED
Notice of Motion/Affirmation/ Exhibit 1/Affidavit/Exhibits 1-2 Affidavit/Exhibit 1	1-16
Notice of Cross Motion/Affirmation/ Affidavit/Exhibits A-E	17-24
Reply Affirmation, Defendants	25
Memorandum of Law, Defendants	26
Memorandum of Law, Plaintiff	27

Upon the foregoing papers, it is ORDERED that this motion by defendants for an order, pursuant to CPLR §3211(a) 7, dismissing plaintiff's complaint for failure to state a cause of action and the cross motion of plaintiff for an order, pursuant to CPLR §3024(b) striking out alleged scandalous and prejudicial averments in the affirmation of defendants' attorney and pursuant to CPLR §3212, granting plaintiff summary judgment, on his first and fifth cause of action, are decided as follows.

Plaintiff, Melvyn Kaufman, ("Kaufman") brings the instant action alleging causes of action for enforcement of covenants, fraud, collusion, and prima facie tort. Kaufman seeks money damages and injunctive relief. Movants'/defendants, Anne Fass and David Fass (the "Fass defendants"), Houlihan Lawrence, Inc. ("Houlihan"), Burbank/Whittemore, Inc. ("Burbank"), and Edgewater Point Property Owners Association, Inc. ("EPPOA"), have answered and now seek dismissal of this action.

EPPOA is a New York Not-For-Profit corporation comprised of 29 members who own real property on Flagler Drive, located at the end of Oriental Avenue in Mamaroneck, New York. The property comprising Edgewater Point was deeded with several covenants which have historically run with each parcel of land owned at Edgewater Point. Covenant #3, provides in pertinent part:

> "That no manufactory, trade or business of any kind whatsoever shall at any time hereafter be erected, maintained or permitted upon the premises hereby conveyed. The term "business" shall be deemed to prohibit the operation or maintenance of a school, hotel or boarding or lodging house and any owner, tenant or occupant of any portion of the property who shall permit paying guests to reside on the premises; or shall house or keep

> one or more guests for the purpose of making money profit shall be deemed to violate the provisions of this paragraph. . ."

On or about April 15, 2000 the Fass defendants leased for two years their residence at 1301 Flagler Drive because of the transfer of Mr. Fass to a position in London. Mrs. Fass's mother, Bea Weintraub, a vice-president and sales associate at Burbank, listed the rental. France Tucker, a broker with Houlihan, secured the tenants. Plaintiff contends essentially that the foregoing covenant prohibits rental for profit of any property within the EPPOA.

On a motion to dismiss a complaint for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory and whether plaintiff actually has a cause of action. *Guggenheimer v. Ginzburg*, 43 NY2d 268. Plaintiff's alleged causes of action are premised essentially on an interpretation of covenant #3, supra.

This Court finds that the language of the covenant seeks to prohibit business, including the operation or maintenance of a hotel or boarding or lodging house. Significantly, a tenant violates the covenant if a tenant permits a paying guest to reside on the premises or houses or keeps guests for the purpose of making money profit. It follows, therefore, that tenants are recognized and permissible under the covenant upon which plaintiff relies. Only the legal authority of the tenant to conduct a business, as defined in the covenant, is limited.

The Court notes defendants contentions that there has been a long history of prior rentals and that rentals are permitted by local zoning. However, for purposes of the instant motion, the plain language of the covenant adequately demonstrates that tenants are not prohibited by the covenant. Accordingly,

the actions of defendants with respect to the tenancy cannot be said to give rise to viable causes of action sounding in enforcement of covenants, fraud, collusion or prima facie tort.

Defendants' motion to dismiss plaintiff's complaint is granted; ~~defendants'~~ II's cross motion is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 28, 2001

ENTER,

/s/ Kenneth W. Rudolph
HON. KENNETH W. RUDOLPH
Justice of the supreme court

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